

# APPLICATION COM/232618 FOR DEREGISTRATION OF PART OF COMMON LAND AT THE SANDS, DURHAM

## The Deregistration and Exchange of Common Land and Greens (Procedure) (England) Regulations 2007

### Statement of Case of the Open Spaces Society

1. On 16 September 2019 the Open Spaces Society objected to this proposal (appended). This objection addressed particularly 2 issues: firstly the quality and character of the proposed replacement land, and secondly the character and recent use history of the proposed release land, and The Sands as a whole.
2. The statement of case looks primarily at the character of The Sands, and of the proposed replacement land in the context of its location and public recreational use. The Open Spaces Society maintains all heads of objection, and notes that other objectors, particularly the City of Durham Parish Council, are addressing the car/coach park use history of the proposed release land.
3. This statement of case is made on behalf of the Open Space Society by Alan Kind, and is set out in 2 parts:
  - A **witness statement** based on observations made during 2 site visits.
  - **Submissions** on matters of law and policy.

### Witness Statement

#### The Site Visits

4. I am Alan Kind of 1 Foxley Close, Newcastle upon Tyne NE12 6FX, and I have worked professionally on recreational land use issues for 35 years. I have known of The Sands for nearly fifty years, since my wife once worked nearby, although I acknowledge that the area has changed considerably in that period. I have visited County Hall and Aykley Heads for occasional work purposes since the 1980s, but was not familiar with what I will call the land beyond County Hall and the Police Headquarters.
5. I made 2 site visits, unaccompanied, because matters arising from my first visit required a further look.
6. Before I set out on this site visit I looked at the 1:25,000 scale Ordnance Survey map, and online satellite imagery, to see if I could judge how people might get from The Sands, up to the proposed replacement land area and its wider setting. I was particularly aware of the need to assess 'the neighbourhood' of each area. I annotated

a portion of Ordnance Survey map (Appendix B) showing the proposed release land in blue/orange, and the proposed replacement land outlined in red (hand-drawn, so not precise). In my view using the Ordnance Survey map gives a better visualisation of the topography between the 2 sites than do the various plans put in by Durham County Council.

7. **On Monday 7th December 2020** I drove to Durham, parked on the North Road near the railway station, and walked to The Sands via the Market Place. I took photographs of the area (Appendix C). I afterwards drove up to Aykley Heads and parked in the new Aykley Woods housing development. From there I walked down to the Rivergreen Centre, and the entrance to the Police headquarters, and from there initially southwards on the main track and other worn paths. I took photographs of the area (Appendix C).
8. I was at The Sands in the late morning on a reasonably bright, dry and chilly winter's day. The proposed release land was fenced-off and major building works were taking place. I saw nobody on the grass, and saw a handful of people on the roads and footways nearby. I noted on the riverbank, bench seats, waste bins, life-saving equipment, and, on street furniture, notices about dog fouling. I took the view that this provision is because local people use The Sands for air and exercise.
9. I noted the proximity of the houses bounded by Providence Row, Orchard Drive, and Gilesgate. It appeared to me that this housing was very much a defined residential neighbourhood, bounded by the river, the A690, and the non-residential city centre. The city provides shops and the usual needs of everyday life. The Sands provides for the residential neighbourhood an adjacent, good-quality, 'friendly and safe' site for dog-walking, kicking a ball about, and generally taking air and exercise. It is also within easy reach of office and commercial developments.
10. I then drove to Aykley Heads. I judged it to be a considerable uphill distance to walk on a winter's day. There is no signed or obvious public parking provision, nor any disabled parking bays. I parked lawfully in the new housing development, but that is not a realistic provision for general public use. I walked along the footway, past the Rivergreen Centre, through the access point (vehicle barrier) on to the well-made track, and turned right (south), so that the proposed replacement land was immediately on my left. The track I was on would ultimately have taken me to the DLI Museum, and city centre beyond, had I gone that far. I went as far as the signed and gated access (on my left) to Aykley Woods Nature Reserve, and I turned westwards (facing the back of County Hall) for a short distance on to the fair quality open land, which was being used by several dog walkers. The presence of waste bins and dog

fouling notices in the area as a whole suggested to me that public access was welcomed.

11. The main track during my visit was being used by local walkers (i.e. not 'hikers') spanning age brackets, and some with dogs or pushchairs. The land and track into the Aykley Wood Nature Reserve was much rougher and wetter, and had no 'welcoming' signs, but equally, no 'keep out'.
12. I turned back north on the main track. The Nature Reserve and East Coast Main Line Railway were then on my right, and at places I could see down towards the area of The Sands. There was no visible form of access linking the 2 areas. The Nature Reserve land was fenced off, with no obvious public access points, and I noticed the 'Wooden Owl' sculpture and though it strange that I could not access this off the main track. I watched one runner enter the Nature Reserve at the name notice (as above) and run anticlockwise towards the north, closer to the railway. I could not see where she ultimately went to.
13. I walked further northwards on the main track, to the barrier access point (through which I had entered the undeveloped land), and continued on the main track, so that the proposed replacement land was on my right. I then made a clockwise circuit around the perimeter of the proposed replacement land, on the tracks outside the fence.
14. The proposed replacement land is fully fenced off, with 'Ground Nesting Birds' warning signs on the fence. The post-and-wire fence alongside the main track (where there is a bench seat) is more robust and 'tighter' than on the other edges. I saw 2 field gates, each padlocked. The proposed replacement land did not look particularly inviting to use other than for, say, dog-walking, even if the gates had been open.
15. On this visit I put my mind to the neighbourhood and localities of the proposed replacement land. The Aykley Woods housing development has made an unbroken connection between Framwellgate Moor and the proposed replacement land, and Newton Hall is already close and connected.
16. **On 10th March 2021** I returned to Aykley Heads for a second site visit. I particularly wanted to consider whether the established built-up areas of Aykley Heads, Framwellgate Moor, and Newton Hall, all or some relate to Aykley Woods and the proposed replacement land so as to be a larger neighbourhood. I also walked around the proposed replacement land perimeter again and took more photographs (Appendix D).
17. As regards the proposed replacement land I noticed several places where what I describe as 'worn foot tracks' lead up to the wire fence, and continue inside the

proposed replacement land, suggesting to me that people are climbing the fence (or, in places, going under the top strand of wire) and are walking inside. I cannot think of any other cause. I photographed six of these locations (attached), and there were others, less defined. These locations can be seen on a site visit. There are places (e.g. near the bench seat at the northern end of the proposed replacement land) where the wire fence is very loose, and can readily be stepped over, or through. I do not think that these paths predate the fence. The fence is plainly not recent (condition of wood and wire) while these tracks have beaten-down the 2020 growth of vegetation.

18. At what I call the northeast corner of the tracks that make a perimeter route, I could see, not far away, the roofs of houses which are the southern edge of Newton Hall. These houses are in easy walking distance from the proposed replacement land, and the surrounding land in recreational use. As I stood at this point I estimated I was about 465 metres from where a public footpath crosses the East Coast Main Line, but the terrain to get there directly did not look at all 'friendly', if usable at all. (See also paragraph 45, and a map plot of the distance in Appendix E).
19. I drove back through the Aykley Heads site to the roundabout on the B6532, and into Framwellgate Moor. Within a kilometre of the proposed replacement land I noted primary schools, secondary schools, colleges, shops, churches, commercial premises, pubs and a war memorial. Framwellgate Moor seamlessly becomes Pity Me, with more local facilities. Newton Hall, to the right (as I drove) has a retail park, employment, churches, medical facilities, and schools. There is a wide range of housing types / values. Pity Me and Newton Hall each have a post office.
20. The City of Durham is a parish, as is Framwellgate Moor. Newton Hall, and Aykley Heads around the school, are unparished (boundaries mapped in Appendix F).
21. It appeared to me as I drove around that Aykley Heads, the new Aykley Woods housing estate, Framwellgate Moor, and Newton Hall, together make a cohesive neighbourhood with a character quite distinct from the City of Durham itself. Simply, a family could live in this neighbourhood with no need to travel to the City of Durham for the everyday needs of life.

### **Observations Arising From the Site Visit**

22. I saw 2 distinct neighbourhoods: The Sands and the adjacent housing; and the Aykley Heads undeveloped land including the proposed replacement land, in the context of Aykley Woods, Framwellgate Moor, and Newton Hall. Residents at The Sands are separated from Aykley Heads by the River Wear, the Mainline Railway, and a circuitous and steeply uphill walking route. There is no easy car access.

23. I have measured, using online Ordnance Survey mapping, the most practicable route for walkers from the proposed release land to the southern end of the proposed replacement land: 1.73 kilometres, or thereabouts (Appendix E).
24. In my view the location of the proposed replacement land cannot be said to be in the same neighbourhood as is The Sands.
25. It was clear to me that there are fewer opportunities for the public to enjoy accessible open space on the south (City) side of the River Wear than there are on the Aykley Heads side, once the busy roads and railway have been passed. Simply, a few square metres of accessible land at The Sands is worth much more to the public than the same, or some more, elsewhere.
26. In my view the proposed replacement land is, by virtue of its character, distance, and difficulty of access, no replacement at all for the loss of the proposed release land to the neighbourhood of The Sands.

## Submissions

### 'Neighbourhood'

27. The Commons Act 2006, section 16 Deregistration and exchange: applications, provides:
  - (6) *In determining the application, the appropriate national authority shall have regard to—*
  - (b) *the interests of the neighbourhood;*
28. 'Neighbourhood' in section 16 is not defined in the Act, but in R (Cheltenham Builders Ltd) v. South Gloucestershire District Council [2003] EWHC 2803 (Admin), which is a village green case, Sullivan J held that it was not a line on a plan but "communities with a sufficient degree of cohesiveness" in relation to the land. Cheltenham Builders is referenced by Holgate J in R oao Tadworth and Walton Residents' Association Mr Clive Elcome v. Secretary of State for the Environment, Foods and Rural Affairs v. Walton heath Golf Club Limited, Reigate and Banstead Borough Council [2015] EWHC 972 (Admin), which is a section 16 case.
29. There is further judicial description of 'neighbourhood' in Sainsbury's Supermarkets Ltd v. National Appeal Panel for Entry to the Pharmaceutical Lists (2003) SLT 688: whether it had natural boundaries or distinct boundaries formed by a large road such as a motorway; the presence or otherwise of facilities which might be expected to exist in a given neighbourhood, including shops, primary schools and a post office; differences in housing types and standards; and differences in socio-economic circumstances.

30. The Sands certainly has cohesiveness with the area of housing bounded by Gilesgate and the A690, but cannot rationally be said to be cohesive with the land at Aykley Heads: distance, the River Wear, and the East Coast Mainline Railway drive that conclusion.
31. The proposed replacement land at Aykley Heads has cohesiveness with the other open land, Aykley Heads, Framwellgate Moor, and Newton Hall, and the whole area has the independent features and facilities needed to show that these together form a neighbourhood.

### Neighbourhood and Localities

32. City of Durham is a parish, as is Framwellgate Moor. Newton Hall, and Aykley Heads around the school, are unparished.
33. A neighbourhood may be situated in one or more localities, see R (oao Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v. Oxfordshire County Council [2010] EWHC 530 Admin.
34. A parish is a locality: see e.g. R (oao Laing Homes Ltd) v. Buckinghamshire County Council [2004] 1 P&CR 36.
35. The Aykley Heads neighbourhood spans parts of 2 parishes, plus an unparished area.

### Can Exchange Take Place Between Neighbourhoods?

36. The Commons Act 2006, section 16 **Deregistration and exchange: applications**, provides:
  - (6) *In determining the application, the appropriate national authority shall have regard to—*
    - (b) *the interests of the neighbourhood;*
37. The Applicant, at paragraph 29 of its statement of case, cites Tadworth, saying, “The interpretation of ‘neighbourhood’ has been described as ‘quintessentially a matter for the judgment of the inspector.’” That is a misquotation. Holgate J says, at 83, “Self-evidently the application of that agreed approach to the identification of the neighbourhood was quintessentially a matter for the judgment of the inspector.” The task of the inspector is to ‘identify’ what is the neighbourhood in the case, and not to ‘interpret’ what constitutes a neighbourhood.
38. The Applicant continues, at paragraph 29, “The Release Land and the Replacement Land may serve different neighbourhoods, although they are only 790m apart as the crow flies.” This issue of ‘different neighbourhoods’ is fundamental. Either the proposed release

land, and the proposed replacement land, are in different neighbourhoods, or they are not. 'May' is not a criterion.

39. Tadworth should not be read as concerning release and replacement between different neighbourhoods. It does not; rather it concerns the Inspector's findings as to the extent of the single neighbourhood within which the exchange took place.
40. It is not clear if the Applicant is saying that exchange between different neighbourhoods is envisaged within the scope of section 16. If the Applicant is saying this then we submit that is wrong. Section 16(6)(b) speaks of "*the interests of the neighbourhood*". Singular. In DEFRA's *Common Land Consents Policy Guidance November 2015*, at paragraph 4.4, 4th bullet, **The interests of the neighbourhood**, "*Will the proposed replacement land, or outcome intended by the proposed works, add something that will positively benefit the neighbourhood?*" Again, neighbourhood singular, and the scheme of the guidance is about the losses and benefits to the neighbourhood where the release land is situated. If section 16 related to separate neighbourhoods, then the statute might, and certainly the guidance would, be expected to set out criteria, For it might well be said on the evidence that the loss of amenity arising from the deregistration of release land in Berwick is more than offset by the increase in amenity arising from the registration of the replacement land in Penzance. If the test in section 16(6)(b) were capable of being satisfied by such an exchange, the meaning of the '*interests of the neighbourhood*' would be indistinguishable from those of the public.

### The Public Interest

41. The Commons Act 2006, section 16 **Deregistration and exchange: applications**, provides:

*In determining the application, the appropriate national authority shall have regard to—*

(c) *The public interest;*
42. In DEFRA's *Common Land Consents Policy Guidance November 2015*, at paragraph 4.5, 5th bullet, "*In the case of deregistration and exchange, the Secretary of State would not normally grant consent where the replacement land is already subject to some form of public access, whether that access was available by right or informally, as this would diminish the total stock of access land available to the public.*"
43. The Durham County Council *Open Space Needs Assessment 2018* was part of the evidence base for the *County Durham Plan* (adopted in 2020) and the proposed replacement land is mapped therein as "*accessible natural green space*". This is confirmed on page 825 of the Applicant's bundle, where the Applicant's Planning Officer describes

the site as “*designated as an area of accessible open space*”. This whole designation scheme is with regard to accessible land for the public’s use.

44. The proposed replacement land already has a formal designation for public access, and therefore fails the Secretary of State’s policy test as set out above.
45. Even if the proposed replacement land is held to be within the scope of the guidance on existing public access, then it is anyway manifestly not in the public interest that the public of The Sands neighbourhood is obliged to walk at least 1.73 kilometres just to access the new site. Further, land immediately adjacent to the proposed replacement land is already acknowledged public access land to which The Sands residents can already walk if they wish. Indeed, the public are *de facto* invited so to walk.

### **Other Heads of Objection**

46. The Open Spaces Society’s objection also sets out other matters relating to alleged incorrect registration, current use as a coach park and cessation of coach park use, of the proposed release land. The Society continues those objections and notes that the submissions of the City of Durham Parish Council (and others) will address the facts of the history of the coach park and how that user has changed.
47. The issue of alleged incorrect registration cannot anyway be investigated within these section 16 proceedings. In *Common Land Consents Policy Guidance November 2015* under *Wrongly registered land*, at paragraph 5.4, “*Nor does the Secretary of State see the purpose of section 16 as enabling the deregistration of land which is claimed to have been wrongly registered: provision is made for that specific purpose in Schedule 2 (paragraphs 6 to 9) to the 2006 Act, and in certain cases, section 19(2)(a). These provisions are in force throughout England.*”
48. And in Paragraph 5.5, “*In considering an application under section 16(1), the Secretary of State will assume that the release land is correctly registered.*”

### **Other Matters in the Applicant’s Statement of Case**

49. At [21] the Applicant states, “*There is no public user of the Replacement Land other than in connection with a permitted, annual, cross country running event.*” The Applicant has scheduled the proposed replacement land as “*accessible natural green space*”, and has further described it as “*accessible open space.*” The tell-tale path marks indicating that people cross the fences to access the land also contradicts the Applicant’s assertion here.



50. At [21] the Applicant states, “ *The Replacement Land has no habitats or wildlife designations, protected species ...*” The land has ‘Ground Nesting Birds’ warning notices on the fences.
51. At [23] the Applicant states, “*It is close to the wider network of permissive and public footpaths.*” That is simply untrue. The proposed replacement land is not “close” to public footpaths. The closest part of a public footpath appears (from the Ordnance Survey map) to be the crossing of the East Coast Main Line some 465 metres distant, and largely inaccessible anyway. There is no viable public footpath network in the immediate area.
52. At [23] the Applicant states, “*It is extremely accessible on foot from The Sands and elsewhere, and by motor vehicle.*” This statement cannot stand up in the face of the evidence about topography and distance. It is not by any metric “*extremely accessible on foot from The Sands*”. The land is, as explained above, about 1.73 kilometres distant, and quite steeply uphill, from The Sands by the least difficult route. Again, as explained above, there is no public car parking at Aykley Heads.
53. At [23] the Applicant states, “*The Replacement Land is approximately 0.79km to the north of the Release Land.*” It might be, but that supposes an ability for the public to ford the River Wear, and cross the East Coast Main Line where there is no crossing.
54. At [26] the Applicant states, “*The public can and does easily enjoy this right of access on the balance of The Sands. It would easily be able to do so on the Replacement Land if the application is granted.*” Again, as stated above, it would not be “easy” for the public to transfer its enjoyment of The Sands to the proposed replacement land.
55. At [30] the Applicant states, “*The proposed Replacement Land would positively benefit its neighbourhood. It would open up an attractive area of land for public recreation ...*” Is the Applicant indicating by “*its neighbourhood*” that the proposed replacement land is in a different neighbourhood from the proposed release land? In our view it cannot be if the application is to succeed. Anyway, the replacement land is already scheduled by the Applicant for “*accessible open space*”.
56. At [30] the Applicant states, “*Depending upon their address, past or current public users of the Release Land for air and exercise (if any) would find the Replacement Land more or less convenient or equally convenient.*” Not at all. The distance and topography involved defeats this assertion.
57. At [30] the Applicant states, “*The Replacement Land would represent a quantitative and qualitative improvement.*” Quantitative, yes, but qualitative, not at all. A much larger plot of much worse character and public utility is no public benefit at all.

## Summary

58. Leaving aside the history of how the Applicant has wrongly inclosed the proposed release land against the public, if this application is taken 'on its merits', then it must fail on various individual counts:
- The proposed replacement land is in a different neighbourhood.
  - The proposed replacement land is already publicly accessible open land.
  - The distance and topography means that the proposed replacement land is of little, if any, utility to the public of the neighbourhood of The Sands.
59. The Open Spaces Society respectfully asks the Secretary of State to reject this application.

## **The Open Spaces Society**

The Open Spaces Society is Britain's oldest national conservation body, founded in 1865.

The Open Spaces Society is a charity registered in England and Wales (no 1144840). The charity is the successor to the Commons, Open Spaces and Footpaths Preservation Society (registered charity no 214753), which was established by a trust deed dated 6 December 1963 and is a non-profit-making company limited by guarantee, registered in England No.7846516. Registered office is: 25a Bell Street, Henley-on-Thames RG9 2BA.

The Open Spaces Society summarises its aims and purpose thus:

*We campaign for stronger protection and opportunities for everyone to enjoy commons, greens and paths.*

*We defend open spaces against loss and pressures from development.*

*We assist local communities so that they can safeguard their green spaces for future generations to enjoy.*

## Attachments

### Appendices

- A. OSS Objection to the Application
- B. Annotated OS map showing the proposed release and proposed replacement land, and elements of the proposed replacement land neighbourhood
- C. Photographs 7 December 2020
- D. Photographs 10 March 2021
- E. Annotated OS maps showing distances
- F. 'Magic' website extract showing parish boundaries

### Case Law (as referenced)

R (Cheltenham Builders Ltd) v. South Gloucestershire District Council [2003] EWHC 2803 (Admin)

R oao Tadworth and Walton Residents' Association Mr Clive Elcome v. Secretary of State for the Environment, Foods and Rural Affairs v. Walton heath Golf Club Limited, Reigate and Banstead Borough Council [2015] EWHC 972 (Admin)

Sainsbury's Supermarkets Ltd v. National Appeal Panel for Entry to the Pharmaceutical Lists (2003) SLT 688 (due to Covid-restricted library access, only a summary report is attached, together with the relevant page of *Gadsden & Cousins on Commons & Greens*)

R (oao Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v. Oxfordshire County Council [2010] EWHC 530 Admin

R (oao Laing Homes Ltd) v. Buckinghamshire County Council [2004] 1 P&CR 36